

Filed in the Clerk's Office 3:05
the 29th day of October, 2003
TESTE: LILLIE M. HART, CLERK
By [Signature] D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE COUNTY

COMMONWEALTH OF VIRGINIA

v.

LEE BOYD MALVO,

Defendant.

Case Nos. CR 03-3089; CR 03-
3090; CR 03-3091

NOTICE AND MOTION TO DISMISS COUNT I OF THE INDICTMENT

COMES NOW the Accused, Lee Boyd Malvo, by counsel, and moves this court on November 10, 2003, at ten o'clock a.m., or as soon thereafter as counsel may be heard, to dismiss Count One of the Indictment herein, and in support thereof states as follows:

1. Lee Malvo was formally charged, by a Fairfax County Grand Jury on January 21, 2003, with a three count indictment. Count One of that indictment charges him with capital murder, and alleges that he "did willfully, deliberately and with premeditation kill and murder Linda Franklin in the commission of an act of terrorism as defined in § 18.2-46.4 of the Code of Virginia. Va. Code §18.2-31(13)."

2. On June 2, 2003, the court heard argument relating to a motion brought by counsel for Mr. Malvo seeking a change of venue. Counsel for Mr. Malvo noted that under the Commonwealth's theory of prosecution, every citizen of Fairfax County is a member of the victim class and would not be a disinterested trier of fact. After hearing argument from both parties, this court clearly acknowledged that defense counsel's argument asking for a new venue based on a

prospective jury pool being unconstitutionally biased, and composed of members of the victim class, was the meritorious position.

3. On July 2, 2003, this court entered an order granting the motion for a change of venue and in its written ruling, the court, without doubt or misunderstanding asserted “[i]ndeed, I believe that venue should be transferred to a jurisdiction outside of the Washington/Richmond corridor, where many citizens lived in fear during the month of October 2002 as a result of the crimes with which the defendant is charged.” (see attached order).

4. Virginia Code §19.2-195 provides that “[a] regular grand jury shall consist of not less than five nor more than seven persons. Each grand juror shall be a citizen of this Commonwealth, eighteen years of age or over, and shall have been a resident of this Commonwealth one year and of the county or corporation in which the court is to be held six months, *and in other respects a qualified juror, . . .*” (Emphasis added).

5. The phrase “in other respects a qualified juror” from Virginia Code §19.2-195 must be interpreted according to the common law, and statutory requirements of jurors. Booth v. Commonwealth, 57 Va. (Gratt.) 519 (1861); Waller v. Commonwealth, 178 Va. 294, 16 S.E.2d 808 (1941).

6. With regard to the function served by a grand jury, Virginia Code § 19.2-191 establishes that such a body is “to consider bills of indictment prepared by the attorney for the Commonwealth and to determine whether as to each such bill there is sufficient probable cause to return such indictment ‘a true bill.’”

7. The above function relating to indictments is essential within Virginia criminal procedure in that Virginia Code § 19.2-217 states that “. . . no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand

jury in a court of competent jurisdiction or unless such person by writing signed by such person before the court having jurisdiction to try such felony or before the judge of such court shall have waived such indictment or presentment”

8. Further, where a defendant does not waive the requirement for an indictment, it is reversible error to proceed without one. “Although neither a preliminary hearing nor an indictment is jurisdictional and constitutionally imposed, it is reversible error to deny such statutory rights whenever asserted by an accused. Armel v. Commonwealth, 28 Va. App. 407, 409 (1999), Triplett v. Commonwealth, 212 Va. 649, 650-51 (1972).

9. The grand jury in the instant case was convened on January 21, 2003, more than five months before this Court decided, on July 2, 2003, that a fair and impartial jury could not be convened in Fairfax County with regard to Count One of the Indictment. That group of Fairfax County citizens made the determination to Indict precisely that much closer in time to the actual alleged incidents which form the basis for the charge herein.

10. Since a competent jury could not be seated to hear this case in July of 2003, it must be concluded that the grand jury which returned the indictment herein was also not competent to hear the case and determine whether or not the indictment was a “true bill” with regard to Count One.

11. Count One of the indictment was returned by a statutorily and constitutionally incompetent grand jury. It is thus void. Accordingly, with regard to Count One herein, since Mr. Malvo has not waived his right to an indictment and has not been presented with a valid document of that type, Count One of the indictment should be dismissed.

WHEREFORE, the Accused respectfully requests that this court to dismiss Count One of

the indictment herein based on the fact the Commonwealth has violated Virginia Code § 19.2-217.

Respectfully Submitted

Lee Boyd Malvo
By Counsel

By: _____
Michael S. Arif
for Craig Cooley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was hand delivered, this 29th day of October, 2003, to Robert F. Horan, Esquire, Commonwealth's Attorney, 4110 Chain Bridge Road, #123, Fairfax, Virginia 22030.

Michael S. Arif

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

)

CRIMINAL NO. 102888

VERSUS

)

**LEE BOYD MALVO a/k/a
John Lee Malvo**

)

**INDICTMENT - CAPITAL MURDER (2
Counts) and USING A FIREARM IN THE
COMMISSION OF A FELONY**

ORDER GRANTING CHANGE OF VENUE

For the reasons stated in the Court's opinion letter dated July 2, 2003, a copy of which is incorporated herein, the defendant's Motion for Change of Venue is **GRANTED**. Venue for the trial in this case, pursuant to Va. Code § 19.2-251, is transferred to the Circuit Court for the City of Chesapeake.

Entered on July 2, 2003.

61

JUDGE JANE MARUM ROUSH



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

(703) 246-2221

Fax: (703) 385-4432

MICHAEL P. McWEENY
MARCUS D. WILLIAMS
STANLEY P. KLEIN
ROBERT W. WOOLDRIDGE, JR.
ARTHUR B. VIEREGG
JANE MARUM ROUSH
M. LANGHORNE KEITH
DENNIS J. SMITH
DAVID T. STITT
LESLIE M. ALDEN
KATHLEEN H. MACKAY
JONATHAN C. THACHER
R. TERRENCE NEY
GAYLORD L. FINCH, JR.
RANDY I. BELLOWS
JUDGES

COUNTY OF FAIRFAX

CITY OF FAIRFAX

JAMES KEITH
BURCH MILLSAP
BARNARD F. JENNINGS
THOMAS J. MIDDLETON
THOMAS A. FORTKORT
QUINLAN H. HANCOCK
RICHARD J. JAMBORSKY
JACK B. STEVENS
J. HOWE BROWN
F. BRUCE BACH
RETIRED JUDGES

July 2, 2003

Robert F. Horan, Jr., Esquire
Raymond F. Morrogh, Esquire
Office of the Commonwealth's Attorney
4110 Chain Bridge Road
Room 123
Fairfax, VA 22030

Michael S. Arif, Esquire
Martin, Arif, Petrovich & Walsh
8001 Braddock Road, Suite 105
Springfield, VA 22151

Craig S. Cooley, Esquire
3000 Idlewood Avenue
P.O. Box 7268
Richmond, VA 23221

In re: *Commonwealth v. Lee Boyd Malvo*, Criminal No. 102888

Dear Counsel:

This matter came on for a hearing on June 2, 2003 on the defendant's Motion for Change of Venue. At the conclusion of the hearing, I took the motion under advisement. For the reasons stated below, the motion for a change of venue will be granted. Venue for the trial of this case will be changed pursuant to Va. Code § 19.2-251 to the Circuit Court for the City of Chesapeake.

In making this ruling, I have taken into consideration the opposition of both the Mayor and the City Council of the City of Chesapeake to trial being held in Chesapeake. Mayor Ward and City Council have written me to express their concern that the trial may disrupt the ability of City employees and citizens to transact business at the municipal complex that houses the courthouse. In addition, the Mayor and City Council are concerned about the anticipated expense to the City in managing a trial of the expected length and public interest of this case.

I have also given serious consideration to the deep reservations expressed to me by the judges of the First Judicial Circuit in Chesapeake, who share the concerns of the Mayor and the City Council.

Certainly the concerns of Mayor Ward, the City Council and the Judges of the First Circuit are not unjustified. Nevertheless, it is my best judgment that the defendant's right to a fair trial requires that venue in this case be transferred from Fairfax County. Indeed, I believe that venue should be transferred to a jurisdiction outside of the Washington/Richmond corridor, where many citizens lived in fear during the month of October 2002 as a result of the crimes with which the defendant is charged.¹

Having decided that venue ought to be changed in this case, I conclude that the City of Chesapeake is the best venue in the Commonwealth of Virginia for this case to be tried.

¹ See, for example, *In Montgomery, Feeling of Safety is Gone*, Washington Post, October 5, 2002, at A1; David Nakamura and Dana Hedgpeth, *As Attacks Mount, Fear Infiltrates Everyday Activities*, Washington Post, October 8, 2002, at A1; April Witt, *A Walk With Fear Weaving Right Alongside*, Washington Post, October 9, 2002, at C1; Brigid Schulte and Nancy Trejos, *Show of Force at Area Schools, But the Jitters Won't Go Away*, Washington Post, October 9, 2002, at A1; Michael D. Shear and Eric M. Weiss, *Fear Overshadows Community Again*, Washington Post, October 13, 2002, at C5; Carol Morello and Jamie Stockwell, *No Attacks, No Arrests, No Shortage of Anxiety*, Washington Post, October 14, 2002, at A1; Hamil R. Harris and Eric M. Weiss, *Time of Fear, Words of Comfort*, Washington Post, October 14, 2002, at B1; Peter Whoriskey, *Home Depot Slaying Defies All Theories: Shooting Spreads Fear to Fairfax*, Washington Post, October 16, 2002, at B1; Avram Goldstein, *Area Residents Showing Signs of Stress*, Washington Post, October 17, 2002, at A1; Monte Reel, *A Region Running Scared? Response May be Excessive, but Situation is Unique, Experts Say*, Washington Post, October 19, 2002 at A1; Peter Whoriskey, *Employees Look Out for Nervous Customers: At Fairfax Strip Mall, Fear Shadows Mundane Chores, Pleasures*, Washington Post, October 20, 2002, at C1; April Witt, *Safety Concerns Grow as Shootings Continue: Fairfax Cancels Football Game Trips*, Washington Post, October 21, 1002, at A16; David Snyder, *Fear is Traveling the Lanes of I-95: Ashland Shooting Expands Danger Zone*, Washington Post, October 21, 2002, at A14; Sue Anne Pressley and Annie Gowen, *Fearful Neighbors Wonder if Killer Lives Among Them: Area Shaken by Not Surprised by Sniper's Apparent Return*, Washington Post, October 23, 2002, at A15; Richard Marin and Claudia Deane, *Half of Area Residents in Fear, Post Poll Finds: Routines Altered as a Precaution*, Washington Post, October 24, 2002, at A1.

Commonwealth v. Malvo
Criminal No. 102888
July 2, 2003
Page 3

For the foregoing reasons, I have today entered the attached order granting the motion to change venue.

Sincerely,

JSI

Jane Marum Roush